IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DISTRICT

In re:	§	CASE NO. 01-47207
	§	
Carolyn J. Davis,	§	Chapter 13
	§	
Debtor.	§	
	§	

MEMORANDUM OPINION AND ORDER

This case involves a lease-purchase agreement for a manufactured home located in Fort Worth, Texas. The dispute arises because the parties cannot agree whether the lease-purchase agreement created a leasehold interest or a security interest. To a great extent, the parties agree on the facts. The parties do not, however, agree on the legal effect of those facts. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), (G) & (O). This memorandum opinion and order constitutes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 9014

I. Factual Background

A. The Agreement

On June 15, 2001, Debtor executed a residential lease-purchase agreement (the "Agreement") with Joseph and Jeanette Wann ("Movants"). The Agreement pertained to that certain manufactured home on real property[1] located at 6093 High Meadow Trail, Fort Worth, Texas (the "Property").[2] The initial term of the Agreement was twelve months[3], with an option

[1] From the pleadings and evidence presented by the parties, it is not clear whether the manufactured home at issue constituted real or personal property. *See* Tex. Prop. Code § 2.001. After conducting its own research on the topic, however, the court does not believe the distinction would change the ruling set forth herein.

[2] Agreement, Page 1, ¶ 2.

[3] Agreement, Page 1, ¶ 3.

to extend for an additional six months.[4] Debtor was to make an initial payment of $7,000 (the "Initial Payment"), which was alternatively referred to as a "down payment" and a "deposit", and subsequent payments of $500 per month for the term of the Agreement.[5] If Debtor breached the Agreement, all monies previously paid to Movants (including the Initial Payment) were to have been nonrefundable.[6] A document titled a "Deposit Receipt" was included with the Agreement when it was entered into evidence. This Deposit Receipt purported to make the Initial Payment nonrefundable in all circumstances once Movants accepted Debtor's lease-purchase application.[7]

The Agreement set the Property's value, and the initial balance due if Debtor chose to purchase the Property, at $35,000.[8] This initial balance was to be reduced first by the amount of the Initial Payment and later by $295 out of each $500 monthly payment.[9] At the end of the Agreement's term (either twelve or eighteen months depending on whether Debtor exercised the six month extension option), Debtor was to have had the option to purchase the Property for the then outstanding balance.

Pursuant to the Agreement, Debtor agreed to pay all taxes on the Property,[10] to carry

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[4] *See* handwritten addendum to Page 1, ¶ 3 (located on page 3 of the Agreement).

[5] Agreement, Page 1, ¶ 3.

[6] Agreement, Page 1, ¶ 5.

[7] Because the Agreement itself stated it had only three pages and the Deposit Receipt would have constituted a fourth page, and because the language of the Deposit Receipt was apparently at odds with the terms of the Agreement, the court will not consider the Deposit Receipt's language concerning a refund of the Initial Payment to be controlling in this matter.

[8] Agreement, Page 1, ¶ 3.

[9] Id. The Agreement contemplated the initial balance of $35,000 would be reduced to $28,000 by the Initial Payment, and then to $24,460 at the end of the first twelve months.

[10] Agreement, Page 2, ¶ 4 (numbered paragraph 2).

insurance on the Property for the benefit of Movants[11] and to pay all utilities (other than water).[12] Debtor also agreed that she would make all required repairs to the Property during the term of the Agreement[13], and that she would redeliver the Property to Movants at the expiration of the Agreement.[14] In consideration of the foregoing, Movants granted Debtor the exclusive option to purchase the Property at the price established by the formula set forth in the Agreement. Movants also agreed to make certain modifications to the Property prior to or immediately following Debtor's occupancy.[15]

B. The Parties' Actions

On October 1, 2001 (the "Petition Date"), Debtor filed a case under chapter 13 of title 11 of the United States Code (the "Code"). On or about June 1, 2002, Debtor elected to exercise her option to extend the Agreement until December 15, 2002. On July 24, 2002, Movant Jeanette Wann sent to Debtor a letter offering to further extend the Agreement for another sixty months if Debtor would agree to increase the monthly payments to $600 per month.[16] Debtor testified that she declined to enter into an agreement for the extended option period on the terms offered by Movants, and that Movants similarly declined to enter into an agreement proposed by her.[17]

Following expiration of the initial option period in December 2002, Debtor paid Movants

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[11] Id.

[12] Agreement, Page 2, ¶ 9 (numbered paragraph 6).

[13] Agreement, Page 2, ¶ 1.

[14] Agreement, Page 1, ¶ 3.

[15] Agreement, Page 3, ¶ 4. (including, without limitation, installing specified electrical outlets, painting specified areas of the residence, replacing drywall and insulation, and installing indoor/outdoor carpet).

[16] At the end of the sixty-month extension, Movants were to have transferred title to the Property to Debtor for no additional consideration.

[17] Neither Debtor nor Movants chose to enter into evidence the various offers or counteroffers to extend the Agreement.

$500.00 per month for the months of January 2003, February 2003, March 2003, April 2003 and May 2003, and remained in possession of the Property. At the hearing on this matter, Movant Joseph Wann testified that he received Debtor's payments, but had not yet cashed the checks for March 2003, April 2003 and May 2003. Mr. Wann testified that Movants and Debtor had been attempting to work out an extension of the Agreement during the months of January 2003 and February 2003, but, as a result of the parties' inability to reach an accord, Movants decided not to cash the checks for March 2003 and beyond.

II. Procedural Background

On March 24, 2003, Movants filed their motion for relief from stay (the "Motion"). In response, Debtor filed her affidavit (the "Affidavit") on April 1, 2003. The court held a preliminary hearing on the Motion, but, as a result of a notice deficiency, the court instructed Movants to obtain a new setting. Movants then filed an amended motion (the "Amended Motion") on May 2, 2003. The court held a hearing on the Motion and Amended Motion on May 8, 2003. After the hearing, the court signed an agreed order instructing the parties to take certain actions pending the court's final decision in this matter.

III. Issues

The issues before the court today are:

1) Whether the Agreement is a lease or a security agreement; and
2) Depending on the resolution of the foregoing issue, how the Agreement should be treated (if at all) in Debtor's chapter 13 case.

IV. Discussion

The primary concern of a court in construing a written agreement is to ascertain the true intent of the parties as expressed in the instrument.[18] If a contract is so worded that it can be given a definite or certain legal meaning, the contract is not ambiguous.[19] If, however, the language of the contract is subject to two or more reasonable interpretations, the contract is ambiguous.[20] When a contract is found to be ambiguous, the court may consider the parties' interpretations and consider extraneous evidence to determine the true meaning of the instrument.[21]

To determine whether the Agreement creates a leasehold or security interest, the court must consider not only the provisions of the Agreement[22], but also the economic realities of the transaction.[23] First, the Agreement itself is titled a "Residential Lease-Purchase Agreement".[24] The Agreement also describes Debtor's payment obligations as "rent", and the parties as "Landlord/Owner" and "Tenant/Buyer".[25] Also of significance is the fact that Debtor had the right to terminate her future obligations under the Agreement at any time without penalty (other than forfeiture of credits for amounts previously paid) by simply returning the Property to

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[18] *See* Kelley-Coppedge, Inc. v. Highlands Insurance Co., 980 S.W.2d 462, 464 (Tex. 1998).

[19] Id.

[20] Id.

[21] Id.

[22] *But see In re* Triplex Marine, Maint., Inc., 258 B.R. 659, 666 (Bankr. E.D. Tex. 2000)(holding that, in determining whether a document is a lease or a security agreement, the court is not bound by any "acknowledgment" by the debtor nor by any other language or designation of parties contained in the agreement).

[23] *See also In re* Homeplace Stores, Inc., 228 B.R. 88, 93 (Bankr. D.Del. 1998) (whether a document is a security agreement as opposed to a lease is dependent on certain factors extrinsic to the document and not capable of control by words in the document).

[24] *But see In re* Owen, 221 B.R. 56, 62 (Bankr. N.D.N.Y. 1998)(finding that the title of an agreement and the designations given to the parties are not controlling).

[25] *See* id.

Movants.[26] Although Debtor was required to maintain insurance on the Property, Movants bore the ultimate risk of loss if the Property was damaged or destroyed.[27] Furthermore, the court concludes that the $7,000 payment made by Debtor on or before May 15, 2001 (i.e. the Initial Payment) was a security deposit within the meaning of Tex. Prop. Code § 92.102[28] (which security deposit Movants agreed would be credited against the ultimate purchase price upon Debtor's exercise of the option to purchase) rather than a true down payment. Finally, Debtor was obligated to pay the taxes for the Property and pay for utilities (other than water).[29]

After careful review and consideration, the court concludes the Agreement is ambiguous as to whether it creates a lease or security interest in the Property. The court must, therefore, consider the parties' interpretations and extraneous evidence presented at the hearing on this matter. While it is a close question in this case, the court concludes that, on balance, the facts favor Movants' position. The court therefore finds the Agreement created a leasehold interest attached to an option to purchase the Property at a discounted price (after credit was given for amounts previously remitted to Movants by Debtor) rather than a security interest in the Property. Having concluded the Agreement was, in substance, a lease coupled with an option to

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[26] *Accord In re* Aguilar, 101 B.R. 481, 483 (Bankr. W.D. Tex. 1989) (cognizable obligation on the part of lessee to complete payments under contract relevant to determination of whether contract created a lease or a security interest). *See also In re* Peacock, 6. B.R. 922, 924 (Bankr. N.D. Tex. 1980).

[27] *See In re* Hydro Servs., 2000 Bankr. 1361, *11 n.5 (Bankr. E.D. Tex. 2000) (considering which party bears the risk of loss or damage to be significant to the determination of whether a particular arrangement is a lease or security agreement). *See also In re* Bergsoe Metal Corp., 910 F.2d 668, 671 (9th Cir. 1990) (considering indicia of ownership (i.e. risk of loss, responsibility to pay taxes, etc.) relevant to determination of whether an arrangement was a lease or security agreement).

[28] Although the structure at issue is a manufactured home, Movant Joseph Wann testified that he was not in the business of leasing manufactured housing. Thus, the court concludes that section 92 of the Texas Property Code (dealing with residential tenancies) applies instead of section 94 of the Texas Property Code (dealing with manufactured home tenancies where the landlord is the owner or manager of a manufactured home *community*).

[29] *See In re* Bergsoe Metal Corp., 910 F.2d 668, 671 (9th Cir. 1990) (considering indicia of ownership (i.e. risk of loss, responsibility to pay taxes, etc.) relevant to determination of whether an arrangement was a lease or security agreement).

purchase, the court must now consider the impact of that determination with respect to Debtor's chapter 13 case.

B. Treatment of the Agreement in Debtor's Chapter 13 Case

Under Texas landlord/tenant law, a landlord is allowed to require a tenant to provide a security deposit in connection with a lease agreement. Such a security deposit consists of any advance of money, other than a rental application deposit or an advance payment of rent, that is intended to secure performance under a lease of a dwelling that has been entered into by a landlord and a tenant.[30] When a landlord requires a security deposit, however, Texas law also requires that the landlord return the deposit to the tenant on or before the thirtieth day after the tenant surrenders the leased premises.[31] A landlord may, however, retain and deduct from a security deposit a sum agreed to in the lease as a lease cancellation fee or actual expenses incurred by the landlord in securing a replacement tenant.[32] A landlord may also deduct from the security deposit damages and charges for which the tenant is legally liable under the lease or as a result of breaching the lease (excluding normal wear and tear).[33]

A tenant who remains in possession of leased premises after termination of the lease occupies "wrongfully" and is said to have a tenancy at sufferance.[34] Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser or as a

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[30] Tex. Prop. Code § 92.102.

[31] Tex. Prop. Code § 92.103.

[32] Tex. Prop. Code § 92.1031(b)(1) & (2).

[33] Tex. Prop. Code § 92.104(a) & (b).

[34] Robb v. San Antonio St. Ry., 82 Tex. 392, 395, 18 S.W. 707, 708 (1891); International & G.N.R. Co. v. Ragsdale, 67 Tex. 24, 28, 2 S.W. 515, 517 (1886).

tenant holding under the terms of the original lease.[35] The Texas Supreme Court has determined, however, that notwithstanding whether the landlord elects to treat the holdover as a trespasser or a tenant holding under the terms of the of the original lease, a holdover tenancy is a new tenancy and not a renewal, extension, or continuation of the original lease.[36]

Waiver of strict performance under a contract may be inferred from the circumstances or course of dealings between the parties.[37] A waiver may result from one party's express or implied assent to continued performance of the other party without objection to the delay.[38] Additionally, actions that reasonably lead the other party to believe strict compliance will not be required will also cause an effective waiver of a time provision in a contract.[39]

The initial term of the leasehold created by the Agreement was twelve months (running through June 2002), but, when Debtor exercised the extension option, was subsequently extended through December 2002. At the end of the December extension, the leasehold created by the Agreement terminated and Debtor became a "holdover tenant" because she remained in possession of the Property. The court finds, however, that Movants, by initiating negotiations with Debtor to further extend the Agreement or enter into a new agreement, waived the default that otherwise would have occurred upon Debtor's failure to immediately surrender possession of the Property upon termination of the Agreement. Movants also failed to prove any other breaches of the Agreement. As a result, the court finds that Debtor did not breach the Agreement

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[36] Bockelmann v. Marynick, 788 S.W.2d 569 (Tex. 1990).

[37] Puckett v. Hoover, 202 S.w.2d 209 (Tex. 1947); 17090 Parkway, Ltd. v. McDavid, 80 S.W.3d 252, 255 (Tex. App. – Dallas 2002); Seismic & Digital Concepts, Inc. v. Digital Resources Corp., 590 S.E.2d 718, 721 (Tex. Civ. App. – Houston [1st Dist.] – 1979), no writ.

[38] Seismic & Digital Concepts, Inc. v. Digital Resources Corp., 590 S.E.2d 718, 721 (Tex. Civ. App. – Houston [1st Dist.] – 1979), no writ.

[39] Id.

and, therefore, has fulfilled her obligations under the Agreement and is entitled to a refund of the Initial Payment on or before the thirtieth day after she returns possession of the Property to Movants (or as otherwise dictated by section 92 of the Texas Property Code).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the automatic stay is hereby modified to allow Movants to pursue eviction remedies they may have under Texas law; and it is further

ORDERED that, upon Debtor's surrender of possession of the Property, Movants shall have thirty days to return the Initial Payment to Debtor (allowing for such offsets or deductions as are allowed under Texas law); and it is further

ORDERED that this Order is without prejudice to the parties' ability to work out an alternative agreement allowing Debtor to remain in possession of the Property.

Signed this 3rd day of June 2003.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

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